STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
STEVEN MOTTAU	)	
VS.	)	W.C.C. NO. 00-04229
SPEIDEL, INC./LIBERTY MUTUAL INSURANCE COMANY	)	
STEVEN MOTTAU	)	
VS.	)	W.C.C. NO. 00-04228
ETCO, INC./BEACON MUTAL INSURANCE CO.	)	
STEVEN MOTTAU	)	
VS.	)	W.C.C. NO. 00-01826
STANLEY BOSTITCH	)	

DECISION OF THE APPELLATE DIVISION

HEALY, J. These matters came on to be heard before the Appellate Division upon the employee/petitioner's appeals from the decisions and

decrees of the trial court denying the employee's petitions for benefits. Initially, these matters were filed as three (3) separate Employee's Original Petitions. The first, Steven Mottau v. Stanley Bostitch, W.C.C. No. 00-01826, alleges a hearing loss as a result of an occupational disease in or about 1995. The second, Steven Mottau v. Etco Inc., W.C.C. No. 00-04228, alleges exposure to noise/occupational disease on January 28, 2000 and seeks total and partial incapacity benefits from January 29, 2000 and continuing in addition to specific compensation for hearing loss. Finally, Steven Mottau v. Speidel Inc./Liberty Mutual Insurance Company, W.C.C. No. 00-04229, alleges exposure to noise/occupational disease on January 28, 2000 and seeks total and partial incapacity benefits from January 29, 2000 and continuing in addition to specific compensation for hearing loss. The petitions were consolidated for trial.

Mr. Mottau testified that he worked at Cumberland Engineering for 2½ years as a machinist before beginning his employment at Stanley Bostitch on February 23, 1976. He described the environment at Cumberland Engineering as "occasionally noisy" and he was provided with hearing protection and administered hearing tests. When he began work at Stanley Bostitch, his hearing was tested there as well. He worked at Stanley Bostitch for almost twenty (20) years, the last fifteen (15) as a "toolmaker." He stated that he left in May or June of 1995.

Mr. Mottau characterized his work environment at Stanley Bostitch as "extremely noisy." His hearing was tested every year, and although he was provided hearing protection and required to use it, he conceded that there were times when he did not. He felt he needed to have his "full hearing" to determine whether the grinders and milling machines were working properly.

Mr. Mottau testified that his hearing was "fairly good" when he began working for Stanley Bostitch, and that he "didn't have as much of a problem as I do now." When testifying about leaving Stanley Bostitch in 1995 Mr. Mottau stated, "I knew it was bad, but I didn't really fully know until after I had the test and more people around me were noticing." (Tr. p. 10). Mr. Mottau did not seek testing until August 1999, over four (4) years after he left Stanley Bostitch's employ.

After leaving Stanley Bostitch, Mr. Mottau worked as a tool maker at Speidel, Inc. from September 1995 to May 1999 and, thereafter, at ETCO, Inc. from August 1999 until December 1999, when he was laid off. The work environments at both Speidel, Inc. and ETCO, Inc. were noisy. Mr. Mottau's hearing was tested at both places of work, and he was provided with hearing protection which he wore.

The trial judge denied and dismissed all three (3) petitions. In each case he found: (1) that the petitioner failed to prove that he sustained a hearing loss which arose out of and in the course of his employment; (2)

that there had been a complete failure of medical proof in the matters; and (3) that the loss of use calculations mandated by the Rhode Island Workers' Compensation Act §28-33-19 had not been performed. In addition, the trial court found that in Steven Mottau v. Stanley Bostitch, W.C.C. No. 00-01826, the statute of limitations had run prior to the filing of the petition. From that decision and decrees the instant appeal followed.

The employee filed the following as his Reasons of Appeal:

> "1. The decision is against the law.
>
> "2. The decision is against the evidence.
>
> "3. The decision is against the law and the evidence and the weight thereof.
>
> "4. The Trial Judge was clearly erroneous to find a complete failure of medical proof of compensable hearing loss when the uncontradicted objective medical evidence proved the hearing loss in accordance with R.I.G.L. 28-33-19.
>
> "5. The Trial Judge was clearly erroneous to find the employee's petition for benefits against Stanley Bostitch was time barred by the statute of limitations."

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless found to be clearly erroneous. *See* Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division is entitled to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Grimes Box Co.,Inc. v. Miguel, 509 A.2d 1002 (R.I. 1986). Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding. For the reasons set

forth, we find no merit in the employee's appeal and therefore affirm the trial judge's decision and decrees.

The Rhode Island Supreme Court has long held that the Workers' Compensation Appellate Division may decide only those questions properly raised on appeal to the Appellate Division. Bissonnette v. Federal Dairy Co., Inc., 472 A.2d 1223, 1226 (R.I. 1984). The Court has frequently stated that the Workers' Compensation Appellate Division, "generally may not consider an issue unless that issue is properly raised on appeal by the party seeking review." Falvey v. Women and Infants Hosp., 584 A.2d 417, 419 (R.I. 1991).

In order for issues to be properly before the Appellate Division, the statutory requirements of R.I.G.L. § 28-35-28 must be satisfied. The pertinent language of R.I.G.L. § 28-35-28 mandates, ". . . the appellant shall file with the administrator of the court reasons of appeal stating specifically all matters determined adversely to him or her which he or she desires to appeal . . . ." This panel can not consider any reasons of appeal that fail to meet the level of specificity required by our statute. Bissonnette, 472 A.2d at 1226. Obviously, general recitations that a trial judge's decree is against the law and the evidence fail to meet the specificity requirements of R.I.G.L. § 28-35-28, and should be disregarded as mere mummery.

Clearly, based upon the aforementioned binding authority, the employee's first three (3) reasons of appeal fail to meet the required standard of specificity. Accordingly, those reasons of appeal are denied and dismissed.

Next, the petitioner argues that the trial judge was clearly erroneous in concluding there was a complete failure of medical proof of compensable hearing loss. Our review of the record leads to the inescapable conclusion that the trial judge's finding is not clearly erroneous.

The petitioner bears the burden of proving allegations contained in a petition for compensation by a fair preponderance of the credible evidence. Blecha v. Wells Fargo Guard Co. Serv., 610 A.2d 98, 102 (R.I. 1992). In addition, the petitioner in a workers' compensation case must produce "credible evidence of a probative force" to support his or her petition. Delage v. Imperial Knife Co. Inc., 121 R.I. 146, 148, 396 A.2d 938, 939 (1979). Uncontradicted evidence "may be rejected if it contains inherent improbabilities or contradictions that alone or in connection with other circumstances tend to contradict it. Such testimony may also be disregarded on credibility grounds as long as the factfinder clearly but briefly states the reasons for rejecting the witness' testimony." Hughes v. Saco Casting Co., 443 A.2d 1264, 1266 (R.I. 1982).

In his decision, the trial judge stated:

> "It is abundantly clear that the burden is on the employee to prove its allegation, in this instance, occupational hearing loss. It is clear that the audiologist, Mary Kay Uchmanowicz, was unable to rate the hearing loss as set forth in the Rhode Island statute, 28-33-19. Equally clear is that in the deposition of Dr. Woodworth, he apparently became aware of Rhode Island statute for the first time at the time of his deposition and that after perusing same, he went on to indicate that in his opinion it is ridiculous and as such he was unable to rate any hearing loss of this employee in accordance with the statute in place. Both the audiologist and Dr. Woodworth clearly have not conformed to the requirements set forth in the statute which governs this issue and have failed to make the appropriate calculations that are mandated by our statute in Section 28-33-19. As such, it is clear that neither of the two experts relied upon by the employee have expressed their opinions following the mandate set forth in Section 28-33-19." (Tr. Dec. pp. 13-14).

From this statement, it is clear from the record that the trial judge found that the petitioner had failed to meet his burden of proving the allegations contained in his petition by a fair preponderance of the credible evidence. The trial judge specifically rejected the testimony of the petitioner's two (2) expert witnesses. He rejected Ms. Uchmanowicz's testimony due to her inability to rate petitioner's hearing loss as mandated by R.I.G.L. § 28-33-19. Similarly, the trial judge rejected Dr. Woodworth's testimony because of his lack of familiarity with the rating process and his professed inability to rate the petitioner's hearing loss in accordance with the statute. The court cited with specificity the reasons for rejecting the employee's medical evidence and we find no error in his evaluation of that evidence. Without the testimony of Ms. Uchmanowicz and Dr. Woodworth,

the employee cannot satisfy his burden of proof. Therefore, the trial judge's finding that there was a complete failure of medical proof of compensable hearing loss will not be disturbed.

The employee next appeals the trial judge's finding that the statute of limitations found in R.I.G.L. § 28-35-57 had run prior to the filing of the instant petition against Stanley Bostitch. The trial judge, in finding that the statute of limitations had expired, considered the fact that the employee alleged he had sustained a hearing loss as of 1995, yet did not file his petition until March of 2000, far in excess of either the statutory filing period or time of manifestation.

The Rhode Island Supreme Court has held that unlike other statutes of limitations, those periods of limitations specified in the Workers' Compensation Act, (particularly § 28-35-57) are considered statutes of repose. Salazar v. Machine Works, Inc., 665 A.2d 567, 568 (R.I. 1995). The difference is that ". . . a 'statute of limitations' bars a right of action unless the action is filed within a specified period after an injury occurs whereas a 'statute of repose' terminates any right of action after a specific time has elapsed irrespective of whether there has as yet been an injury." Id.

The employee in the matter before this tribunal has failed to satisfy his burden of showing that his petition was filed within the time limitations of R.I.G.L. § 28-35-57. He offered no explanation for the failure to file a

petition against Stanley Bostitch prior to 2000 when he was aware of his hearing loss when he left work there in 1995. As such, the trial court's decision and decree will not be disturbed.

Based upon the foregoing, the employee's reasons of appeal are hereby denied and dismissed and we, therefore, affirm the trial judge's decision and decrees in these three (3) matters.

In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, decrees, copies of which are enclosed, shall be entered on

Rotondi and Bertness, J.J. concur.

ENTER:

_____
Rotondi, J.

_____
Healy, J.

_____
Bertness, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

STEVEN MOTTAU)
)
VS.)
W.C.C. NO. 00-04229
)
SPEIDEL, INC./LIBERTY MUTUAL
INSURANCE COMPANY)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the employee/petitioner, and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on March 21, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Rotondi, J.

_____
Healy, J.

_____
Bertness, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq. and Karen Finley, Esq. on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
STEVEN MOTTAU	)	
	)	
VS.	)	W.C.C. NO. 00-04228
	)	
ETCO, INC./BEACON MUTUAL INSURANCE CO.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the employee/petitioner, and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on March 21, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Rotondi, J.

_____
Healy, J.

_____
Bertness, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq. and Ronald A. Izzo, Esq. on

_____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

STEVEN MOTTAU)
)
VS.) W.C.C. NO. 00-01826
)
STANLEY BOSTITCH)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the employee/petitioner, and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on March 21, 2002 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Rotondi, J.

_____
Healy, J.

_____
Bertness, J.

I hereby certify that copies were mailed to Stephen J. Dennis, Esq. and Michael T. Wallor, Esq. on

_____